STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2013
v	No. 297769 Oakland Circuit Court
JASON RICHARD ROSE, Defendant-Appellant.	LC No. 2009-229124-FH

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

I concur fully with the majority's analyses and conclusions on every issue except the analysis of the trial court's decision to score 15 points under offense variable (OV) 10. See MCL 777.40. I conclude that the trial court clearly erred when it found that the prosecutor had established by a preponderance of the evidence that defendant Jason Richard Rose engaged in predatory conduct under MCL 777.40. Because this error altered Rose's minimum sentence range, he is entitled to resentencing. Accordingly, I would affirm his convictions, but vacate his sentences and remand for resentencing consistent with this opinion.

I. THE STANDARD OF REVIEW

As a preliminary matter, I feel compelled to address the conflicting recitations of the standard of review applicable to a trial court's scoring of offense variables under the legislatively mandated sentencing guidelines.[1]

A. THE DISCRETION TO SCORE

This Court frequently states that it reviews a trial court's decision to score a particular offense variable for an abuse of discretion. See, e.g., *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) ("A sentencing court has discretion in determining the number of points

[1] Although I discuss the review applicable to the scoring of offense variables, this same standard would apply to the scoring of prior record variables.

to be scored, provided that evidence of record adequately supports a particular score."). In reviewing the decisions applying the abuse of discretion standard to the current sentencing guidelines, I could not find one where this Court analyzed the statutory scheme to determine whether the Legislature actually gave trial courts the discretion to score offense variables as they see fit. Instead, it appears that in each case, this Court relied on authorities that can be traced back to the standard of review applicable to sentencing decisions prior to the Legislature's adoption of the sentencing guidelines, which became effective in 1999. See 1998 PA 317. This is problematic because a review of the applicable statutory scheme demonstrates that the Legislature did not give trial courts any discretion in the scoring of offense variables.

For all enumerated offenses committed on or after January 1, 1999, Michigan courts *must* impose a minimum sentence that is "within the appropriate sentence range under the" sentencing guidelines unless the court meets the stringent requirements for departing from the guidelines. MCL 769.34(2). To determine the sentencing range, the trial courts *must* find the offense category for the enumerated offense and *must* score the offense variables required for that offense category. MCL 777.21(1)(a); MCL 777.22. Turning to the variables themselves, the Legislature stated that the trial court *must* score each variable using the highest applicable score, which—for each variable—may be zero. See MCL 777.31(1); MCL 777.32(1); MCL 777.33(1); MCL 777.34(1); MCL 777.35(1); MCL 777.36(1); MCL 777.37(1); MCL 777.38(1); MCL 777.39(1); MCL 777.40(1); MCL 777.41(1); MCL 777.42(1); MCL 777.43(1); MCL 777.44(1); MCL 777.45(1); MCL 777.46(1); MCL 777.47(1); MCL 777.48(1); MCL 777.49(1); MCL 777.49a(1). Thus, although the Legislature provided trial courts with the discretion to select the specific minimum sentence from within the applicable sentencing range, see MCL 769.34(2), and to depart from the minimum sentence range under certain limited circumstances, see MCL 769.34(3), it did not provide them with the discretion to score offense variables as they see fit. Rather, trial courts must score the offense variables and must score them properly. See *People v Bemer*, 286 Mich App 26, 32, 34-35; 777 NW2d 464 (2009).

I am cognizant of the fact that this Court is bound to follow prior precedent—even if that precedent is erroneous—until corrected by a conflict panel or our Supreme Court. See MCR 7.215(C)(2); MCR 7.215(J). However, it is also evident to me that this Court, for all practical purposes, has been applying a de novo standard of review even when it recites an abuse of discretion standard. A trial court necessarily abuses its discretion when it exercises its discretion on the basis of an erroneous application of law. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Because the Legislature provided a comprehensive and integrated statutory scheme for the scoring of offense variables that provided the trial courts with no discretion in the scoring of those variables, a trial court's failure to properly score an offense variable will—as a matter of law—constitute an abuse of discretion. *Id.* Therefore, rather than continue to recite a standard of review that we do not in fact apply,[2] I would hold that whether a trial court has

[2] I cannot conceive a situation where this Court could meaningfully apply the abuse of discretion standard—if the score is correct, it will be correct as a matter of law, and if the score is incorrect, it will be incorrect as a matter of law. By way of example, suppose that a trial court found that the defendant used a knife and that a victim had a reasonable apprehension of an immediate battery at the time. The trial court would be required to score OV 1 at 15 points. See MCL

properly interpreted and applied the sentencing guidelines to the facts before it is a question of law that this Court reviews de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

B. THE ANY EVIDENCE STANDARD

While this Court's recitation of the abuse of discretion standard for the scoring of offense variables is—for all practical purposes—a matter of semantics, the same cannot be said of this Court's application of the "any evidence" standard of review. Under this standard, it is said that this Court will uphold a trial court's decision to score a particular variable if there is *any evidence* to support that score. See *Hornsby*, 251 Mich App at 468 ("'Scoring decisions for which there is any evidence in support will be upheld.'", quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996)). Again, this articulation of the standard invariably traces its origins to authorities that predate the enactment of the legislatively mandated sentencing scheme.

The "any evidence" appears to have arisen from this Court's reluctance to second-guess a trial court's application of the then non-binding sentencing guidelines:

> As noted above, this Court will not get bogged down in second-guessing the detailed calculations under the sentencing guidelines. In the overwhelming majority of cases, review of the sentencing guideline calculation should be perfunctory. Only in the very extreme case should there be any appellate review. Since here the trial judge had adequate evidence to score defendant as he did under the sentencing guidelines, resentencing of defendant is unnecessary. [*People v Clark*, 147 Mich App 237, 243; 382 NW2d 759 (1985).]

Similarly, this Court related that, because the former sentencing guidelines were merely a tool for the trial court in the exercise of his discretion to select a minimum sentence, it would uphold a trial court's scoring of the variables if there was any evidence to support it. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986). And, our Supreme Court agreed that the "any evidence" standard should apply where the defendant failed to raise the scoring error before the trial court. See *People v Hernandez*, 443 Mich 1, 16-17; 503 NW2d 629 (1993), abrogated by *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1993), citing *Green*, 152 Mich App at 18. Thus, the "any evidence" standard appears to have been applied to unpreserved challenges to a trial court's scoring of the sentencing variables. *Id.* at 16-17, 16 nn 23 and 25; see also *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987). Nevertheless, our Supreme Court also held that, where a defendant properly challenges the scoring of a variable at sentencing, the trial court must resolve the dispute by finding whether the prosecutor established by a preponderance of the evidence that the facts were as the prosecution asserted. *Walker*, 428 Mich at 267-269. That is, our Supreme Court recognized a distinction between an unpreserved challenge, which would be

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777.31(1)(c). If, despite its findings, the trial court elected to score OV 1 at 5 points for the display of the knife, see MCL 777.31(1)(e), this Court would undoubtedly conclude that the trial court abused its discretion. Why? Because the trial court erred *as a matter of law* when it failed to follow the Legislature's command that it apply the highest score applicable under the facts found. See MCL 777.31(1).

upheld if there were any evidence to support the score, and a preserved challenge, which would be reviewed to determine whether the prosecutor established the facts by a preponderance of the evidence. Hence, this Court may have misapplied these prior precedents to the current sentencing scheme.

In any event, with the enactment of the mandatory sentencing guidelines, the Legislature addressed this Court's ability to review a trial court's selection of a minimum sentence. First, the defendant must challenge the scoring at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10). Second, this Court must affirm a sentence that is within the guidelines range unless the trial court erred in scoring the sentencing guidelines (which would be a question of law) or relied on inaccurate information. MCL 769.34(10). And our Supreme Court has since stated that trial courts must score the sentencing variables on the basis of facts found by a preponderance of the evidence and that appellate review of those findings is for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Because the "any evidence" standard is incompatible with the clear error standard, I conclude that this Court must apply the clear error standard provided in *Osantowski* until our Supreme Court clarifies whether and to what extent the "any evidence" standard has continuing validity. See *Paige v Sterling Hts*, 476 Mich 495, 524, 720 NW2d 219 (2006) (stating that only the Supreme Court has the authority to overrule one of its prior decisions and "all lower courts and tribunals are bound by that prior decision and must follow it", even if the lower courts believe it was wrongly decided).

C. THE CORRECT STANDARD OF REVIEW

Accordingly, I would review de novo as a question of law whether the trial court properly interpreted and applied the sentencing guidelines to the facts of this case. *Cannon*, 481 Mich at 156. And I would review the factual findings underlying the trial court's application of the sentencing guidelines for clear error. *Osantowski*, 481 Mich at 111. I would also clarify that this Court will review a trial court's findings by examining the entire record to determine whether we are left with the definite and firm conviction that the trial court's finding was mistaken, notwithstanding that there was some evidence to support it. *In re JK*, 468 Mich at 209-210.

II. APPLYING THE STANDARD

Under MCL 777.40(1), the trial court had to score OV 10 using the highest applicable score. At sentencing, the trial court determined that Rose engaged in predatory conduct and, for that reason, scored OV 10 at 15 points. See MCL 777.40(1)(a). "Predatory conduct" is "preoffense conduct directed at the victim for the primary purpose of victimization." MCL 777.40(3)(a).

In *Cannon*, our Supreme Court stated that predatory conduct involves more than mere preparation; as such, "run-of-the-mill planning to effect a crime" will not justify a score of 15 points. *Cannon*, 481 Mich at 162. Instead, it determined that, in order to establish that the conduct was predatory under MCL 777.40(3)(a), the trial court must find that: (1) the offender engaged in conduct before the commission of the offense, (2) which was directed at one or more

specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and (3) that the victimization was the offender's primary purpose for engaging in the preoffense conduct. *Id*.

Here, there was some evidence that Rose engaged in stalking-type conduct before the night at issue, but there was no evidence that that conduct had any relation to this incident. Moreover, although the trial court found that Rose waited until Smolinski fell asleep before committing the crimes, the only evidence to support that finding was that Rose committed the arsons late at night. But the fact that he did not commit the arson until late at night does not give rise to an inference that the timing was deliberate or that he waited for the primary purpose of exploiting Smolinski's weakness.

There was also no evidence that Rose was lying in wait for the opportunity to commit the crime. Indeed, contrary to the conclusion stated by the author of the presentence report, there is no record evidence that Rose planned the crime in advance. Although one might infer that he brought a gas can with him, it is just as plausible that the gas can was already on site. The fact that he used a landscaping rock to break the van's window also tends to suggest that the events were rather impromptu.

Because the lateness of the events does not by itself support the finding that Rose engaged in predatory conduct and there was otherwise evidence that the arson was not planned in advance, I am left with the definite and firm conviction that the trial court erred when it found that Rose exploited Smolinski's weakness by waiting until she was asleep to commit the arson. As such, I conclude that the trial court erred when it scored OV 10 at 15 points. Because this scoring error affects the appropriate guidelines range, Rose is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

For these reasons, I concur in part and dissent in part.

/s/ Michael J. Kelly